IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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February 26, 1981

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. hereby moves, pursuant to Supreme Court Rule 36 for leave to file the annexed brief *amicus curiae* in support of petitioner in the above-captioned proceeding. Consent to the filing of this brief has been obtained from counsel for petitioner; counsel for respondents has been contacted and has indicated that he objects.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative pro-

cess in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz,* 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York,* 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California,* 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego,* No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979); and *Rostker v. Goldberg,* No. 80-251 (filed July 18, 1980).

The Washington Legal Foundation believes that it is in the public interest to guarantee businessmen the authority to allocate capital and close down unproductive facilities for economic reasons without undue interference by federal agencies or the courts. The decision of the Second Circuit, by unnecessarily restricting these economic freedoms inherent in the free enterprise system, is inconsistent with the purposes and goals of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist this Court in obtaining full consideration of all the public interest issues involved. Not only is petitioner injured by this decision; many other business enterprises seeking to relocate or close down unproductive facilities are likewise threatened with economic harm. Restrictions on economic freedom, such as those imposed by the decision of the Second Circuit, injure labor as well as business, and interfere with all sectors of the economy in manners which the parties to this proceeding have not brought to the full attention of this Court.

Accordingly, the Washington Legal Foundation requests that it be permitted to participate as *amicus curiae* in this matter.

Respectfully submitted,

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The Washington Legal Foundation believes that it is in the public interest to guarantee businessmen the authority to allocate capital and close down unproductive facilities for economic reasons without undue interference by federal agencies or the courts. The decision of the Second Circuit, by unnecessarily restricting these economic freedoms inherent in the free enterprise system, is inconsistent with the purposes and goals of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist this Court in obtaining full consideration of all the public interest issues involved. Not only is petitioner injured by this decision; many other business enterprises seeking to relocate or close down unproductive facilities are likewise threatened with economic harm. Restrictions on economic freedom, such as those imposed by the decision of the Second Circuit, injure labor as well as business, and interfere with all sectors of the economy in

manners which the parties to this proceeding have not brought to the attention of this court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the case contained in the Petitioner's Brief for Writ of Certiorari.

SUMMARY OF ARGUMENT

Amicus submits that the decision of the Second Circuit holding petitioner guilty of an unfair labor practice is contrary to the purposes of the Act, against sound public policy, and therefore should be reversed. The National Labor Relations Act, 29 U.S.C. §§151, *et seq.*, was never intended to require employers to bargain over any management decision which might conceivably have an impact on the terms and conditions of employment. The decision to close down or transfer a facility, when made for purely economic reasons, is reserved to the discretion of the employer. The purposes of the Act would not be served by mandatory bargaining in such situations.

Amicus further submits that it is not in the public interest for the phrase "terms and conditions of employment" in the Act to be given a sweeping and overbroad application. By imposing a duty of collective bargaining in the case of plant closings, the decision impairs business mobility and interferes with the free allocation of capital. These economic freedoms are crucial to the proper functioning of the free enterprise system and the continued prosperity of the American people.

That does not mean that workers may not contract with employers whereby employers may agree to notify employees before plant closings and the like. However,

any across-the-board restrictions on the ability of businesses to close all or part of their operations for economic reasons should come from the legislative rather than the judicial branch.

I.

AN EMPLOYER DOES NOT HAVE A DUTY TO BARGAIN WITH A UNION OVER AN ECONOMICALLY MOTIVATED DECISION TO TERMINATE ONE PORTION OF AN EXISTING ENTERPRISE.

The purpose of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*, is to encourage the peaceful resolution of labor disputes through collective bargaining. The role of government is not to step in and resolve disputes between employers and employees, but rather to provide mechanisms whereby the parties may resolve the disputes themselves. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43 (1937). Consistent with this statutory goal, it is an unfair labor practice, and therefore a violation of federal law, for an employer to "refuse to bargain collectively with the representatives of his employees. . . ." National Labor Relations Act §8(a)(5), 29 U.S.C. §158(a)(5) (1975) ("the Act").

Collective bargaining is defined in section 8(d) of the Act as follows:

> (d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and terms and conditions of employment. . . .

The issue in this case is whether the decision of an employer to terminate a portion of his business operations,

for purely economic reasons, and with no indication of anti-union animus, constitutes a "term or condition of employment" which is the subject of mandatory collective bargaining.

Amicus submits that a managerial decision to terminate a portion of a business operation for purely economic reasons never gives rise to a duty to bargain because such decisions "lie at the core of entrepreneurial control" of management. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 223 (Stewart, J., concurring). The decision of the Second Circuit holding that there is a rebuttable presumption of a duty to bargain is incorrect, would not serve the purposes of the Act, and therefore should be reversed.

In two decisions, the Supreme Court addressed the general question of whether there is a duty to bargain over the decision to close a portion of an ongoing business. In *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), the Supreme Court held that "the replacement of employees in [an] existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment . . . is a statutory subject of collective bargaining." *Id.* at 215. The decision was limited to this particular form of contracting out and did not address the broader ramifications of partial closings.

Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263 (1965), involved a plant closing motivated solely by anti-union animus on the part of the employer. This Court nevertheless held that if the plant at issue was found to be a separate business unrelated to other plants owned by a parent company, it would not be an unfair labor practice to close the plant, even if motivated by anti-union animus. *Id.* at 269-270. How-

ever, if the plant was found to be a part of a larger, integrated group of subsidiaries, the partial closing would be an unfair labor practice if the purpose was to discourage unionism in any of the employer's remaining plants and if the employer may reasonably have foreseen such an effect. *Id.* at 275. The case was then remanded to the lower court for further fact-finding.

Although both of these decisions were narrowly limited to the facts of the case, *amicus* submits that Justice Stewart's concurrence in *Fibreboard* provides the framework for a proper analysis of the meaning of these two decisions. 379 U.S. 203, 218 (Stewart, J., concurring). Justice Stewart initially recognized that the words of the statute are words of limitation. The National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, does not confer on employees the right to bargain over *any* subject that interests them or that may possibly affect their employment, but only over a limited category of issues. *Id.* at 220.

Amicus submits that any statutory prohibition or restriction on the rights of management or workers to operate in a free-market economic system should be narrowly construed lest constitutional rights be infringed. *See Abood v. Detroit Board of Education,* 431 U.S. 209 (1977); *see generally* B. Siegan, *Economic Lberties and the Constitution* (1980).

While employment security may be a proper subject of bargaining, the right of an employer to make decisions about capital allocation without undue hindrance must also be considered. As stated by Justice Stewart:

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this

> alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

379 U.S. at 223, (Stewart, J., concurring).

Accordingly, the purposes of the Act, and the interests of labor generally, will best be served by a narrow interpretation which leaves businessmen free to make entrepreneurial decisions without undue interference by unions or government.

A majority of the Circuits have followed Stewart's reasoning and found no duty to bargain where the decision to terminate is based on valid financial considerations. These courts properly recognize that the purpose of the Act will not be served by interference with the free allocation of capital and the employer's right to make essential business decisions. *Royal Typewriter Co. v. NLRB,* 533 F.2d 1030 (8th Cir. 1976); *NLRB v. Edward M. Rude Carrier Corp.,* 79 Lab. Cas. 21,633 (4th Cir. 1976); *NLRB v. Thompson Transport Co.,* 406 F.2d 698 (10th Cir. 1969); *NLRB v. Transmarine Navigation Corp.,* 380 F.2d 933 (9th Cir. 1967).

Before the decision of the Second Circuit in the instant case, only the Third Circuit had found a duty to bargain in the case of the termination of a portion of a business enterprise. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978). And even then, *amicus* submits that both the Second and Third Circuits were forced to use tortured interpretations to distinguish their own prior decisions *rejecting* a duty to bargain. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

It is clear that the weight of case law and the logic of the statutory scheme argue for a reversal of the decision of the Second Circuit. The National Labor Relations Act was never intended to give employees the right to bargain over any and all decisions by management which might conceivably have an impact on their employment security. Rather, *amicus* suggests that the langugage of the Act giving unions the right to bargain collectively over "terms and conditions of employment" does not mean "terms and conditions" of *un*employment where such unemployment results from economically motivated business decisions that assure profitability and the continued viability of the going concern. It was an established fact that the petitioner was "losing money" in the operation that was shut down. (A. 4).[1] Therefore, the Washington Legal Foundation urges this Court to resolve the conflict among circuits by reversing the decision of the Second Circuit in the instant case and adopting the more reasoned and moderate interpretation of section 8(d) of the Act by the Fourth, Eighth, and Tenth Circuits.

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[1] "A." refers to the Appendix in the Court of Appeals.

II.

ASSUMING, *ARGUENDO*, THAT THERE IS A PRESUMPTIVE DUTY TO BARGAIN AS HELD BY THE SECOND CIRCUIT, THERE WAS NO DUTY TO BARGAIN IN THE INSTANT CASE BECAUSE THE BARGAINING WOULD HAVE BEEN FRUITLESS AND THEREFORE WOULD NOT HAVE SERVED THE PURPOSES OF THE ACT.

Petitioner provides housekeeping and maintenance services for various customers, including the Greenpark Care Center, the facility at issue in this case. (A. 2). Under the terms of its contract with Greenpark, petitioner provides all the necessary labor, supplies and supervision required to do the work and in return is reimbursed for its labor expenses and paid a management fee. (A. 43).

At the same time that the union[2] was in the process of being recognized as the bargaining agent for the employees of Greenpark, petitioner was coming to the realization that its operations at Greenpark were unprofitable and were not likely to move into the black in the future. (A. 4). Petitioner notified Greenpark on June 30, 1977 that if its management fee was not increased petitioner would have to terminate its operations at Greenpark effective midnight on July 31, 1977. (A. 72-73). After negotiations with Greenpark failed on July 25, petitioner informed its employees of the decision to terminate on July 31. (A. 41). Since there was a 30-day notice period of termination between petitioner and Greenpark, another month of economic loss would have

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[2]District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

been incurred by petitioner if he had kept that operation going for another day.

The Second Circuit below agreed with the decision of the Third Circuit in *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978), that there is "an initial presumption . . . that a partial closing is a mandatory subject of bargaining." *Id.* at 735; *NLRB v. First National Maintenance Corp.*, 627 F.2d 596, 600 (2d Cir. 1980). However, this presumption may be rebutted by a "showing that the purposes of the statute would not be furthered by imposition of a duty to bargain." *Id.* at 601.

The facts here clearly establish that any negotiation between petitioner and the union would have been fruitless, because labor costs were simply not the reason for the unprofitability of its operations at Greenpark. Greenpark would have paid petitioner's full labor costs for the employees assigned to the facility regardless of the terms of the contract negotiated between petitioner and District 1199. Yet petitioner would still have been required to close down operations because the management fee it received from Greenpark was inadequate and despite extended negotiations, Greenpark refused to raise this fee. Therefore, as Judge Kearse recognized in her dissent, petitioner's decision to close down Greenpark was made solely for economic reasons; labor costs were not a relevant factor in petitioner's loss of money and no purpose would have been served by collective bargaining. *Id.* at 604-605, (Kearse, J., concurring and dissenting in part).

The Second Circuit misinterpreted the facts of this case in applying its test for determining when there is a duty to bargain. In effect, the Second Circuit was supplying its own business judgment in hindsight for that of the experienced business enterprise. The purposes of the

Act simply would not have been served by collective bargaining in this case despite the wishful thinking of the Second Circuit. Therefore, the decision of the Second Circuit ordering collective bargaining should be reversed.

III.

THE IMPOSITION OF A DUTY TO BARGAIN IN THIS TYPE OF CASE IS CONTRARY TO PUBLIC POLICY BECAUSE SUCH A REQUIREMENT WILL HAVE THE EFFECT OF IMPAIRING BUSINESS MOBILITY, SLOWING ECONOMIC GROWTH, AND HARMING THE NATIONAL ECONOMY.

Just as the Constitution guarantees American citizens fundamental political freedoms and civil liberties, so does our free market economic system assure continuing prosperity and economic opportunity for all Americans. An unconstrained free market, permitting enterprises to make investment and pricing decisions without government control or interference has proven to be the most efficient system of economic organization in the last two centuries. The Washington Legal Foundation believes that restrictions on economic opportunity and freedom are to be avoided and should only be justified by the most compelling state interest.

Limited government regulation of serious health and safety problems may be necessary, but many federal regulations and court decisions in recent years have gone far beyond what is essential for the proper functioning of a free economy. *Amicus* submits that the broad holding of the Second Circuit in this case constitutes an unwarranted restraint on economic freedom and opportunity and therefore is contrary to public policy.

That does not mean, however, that workers cannot contract with their employer regarding prior notifications

of plant shutdowns and the like. However, such duty should not be automatically required across-the-board for all companies covered by the Act. As stated by Judge Rosenn in *Brockway:*

> If an employer must bargain before he can reach a decision to close a plant, how long must he continue to operate under possibly adverse, costly, and unprofitable conditions while the bargaining process goes on? How long must bargaining continue and who shall decide and by what criteria shall it be determined whether the bargaining has been sufficient? When the employer ceases bargaining, is he susceptible to a charge of bad faith or coercion? Must he engage in protracted litigation over a significant business judgment which may have to be implemented promptly, if it is to be made at all? These questions are unanswered by the majority and are treated as subsidiary to the ultimate question of whether there is a duty to bargain.

Brockway Motor Trucks v. NLRB, 582 F.2d 720, 748 (3d Cir. 1978) (Rosenn, J., dissenting). *See generally* Note, *"Partial Terminations" – A Choice Between Bargaining Equality and Economic Efficiency,* 14 U.C.L.A. L. Rev. 1089 (1967).

Business, in order to maximize profits and thereby enhance the general welfare, must be free to establish, transfer and terminate operations when the market dictates. Of special importance is the freedom to transfer plant and equipment from unproductive declining areas of the country, to those areas where labor, raw materials and markets are most favorable. This issue has aroused substantial public interest across the political spectrum because of a perceived shift of economic resources from the north and northeast (the so-called "snow-belt" states)

to the south and west (the "sun-belt" states).[3] Legislation has even been proposed at the state and federal level to penalize such shifts in economic resources or to require companies considering such moves to provide notice several years in advance and negotiate with labor unions and local governments.[4]

Because *amicus* believes that the decision of the Second Circuit would have the same harmful effects on business mobility and economic growth as would this legislation, the Washington Legal Foundation encourages this court to seriously consider the economic effects of its decision. *Amicus* further submits that the solution to this whole problem is best left not to the judicial branch, but to the legislative forum where it can be subject to full public debate. See R. McKenzie, *Restrictions on Business Mobility, A Study in Political Rhetoric and Economic Reality* (1979) for an excellent analysis of the economic costs of laws impairing the free movement of capital.

Change and development is the sign of a healthy economy; restrictions on such changes can only harm the

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[3]Concern among northern political and labor leaders that American business would completely desert cities such as Cleveland, Dayton, Detroit, and Boston for the sun-belt has proved to be unwarranted. The American economy, although seriously ill, has displayed incredible resiliency, as a comparison of regional economic growth rates indicates. The New England region, for example, once considered an economic basket case, has turned around in recent years. Wall Street Journal, February 17, 1981, at 30, col. 1. Business mobility, when unhindered, will allocate capital where the return is greatest and all areas of the country will benefit. Restrictions on business movement, such as a judicially-imposed duty to bargain before plant closings, will create economic inefficiencies and make it more difficult for less prosperous regions to reverse their growth patterns.

[4]*See* R. McKenzie, *Restrictions on Business Mobility* 1 (1979).

American economy and impair our competitiveness in the world market. For these reasons, *amicus* believes that the decision of the Second Circuit, which imposes unnecessary and harmful burdens on businesses seeking to transfer or shut down unprofitable operations, should be reversed.

CONCLUSION

The decision of the Second Circuit holding that employers are presumed to have a duty to bargain with employees over an economically motivated business decision to terminate a portion of a business enterprise is incorrect and should be reversed. The purpose of the National Labor Relations Act would never be served by collective bargaining in such circumstances, a fact which has been recognized by most of the courts which have addressed this issue. Such bargaining, on the other hand, could seriously impair business mobility, interfere with free movement of capital, and generally injure our free

market economic system. For all of these reasons, *amicus* urges this court to reverse the decision of the Second Circuit and free employers from the duty to bargain with unions before closing a portion of their operations for economic reasons.

Respectfully submitted,

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